

## **Confidential Facts - Round 1 - Trodden, et al.**

When Dawn Trodden read about Biomassive paying small fines to the local air districts, she was shocked. She is also sympathetic to her neighbor Floyd Hawken for his kidney disease. Trodden is concerned about the effects of breathing the emissions from Biomassive's facility on her own long-term health, and that of her neighbors.

For the lawyers for Trodden, Hawken, and the neighbors, the main goals are to get Biomassive to pay as much as possible, so that in the future it will not continue to pollute the air. They will worry about splitting up the money later. The neighbors are in fact concerned about what the costs of litigation against Biomassive. As a start-up fund they were collectively only able to gather \$15,000 to hire their lawyers. This will not be enough to fund ongoing litigation, expert witnesses, and the expenses of taking the depositions of the many Biomassive employees. The citizens are aware that Biomassive has extensive resources to apply to the litigation. While the Clean Air Act allows them to recover their attorneys fees if they prevail, (42 U.S.C. § 7604, subd.(d)), the firm they retained is a small practice that cannot afford to finance the litigation in anticipation of a large fee award. Biomassive, however, is not aware of the residents' fee arrangement.

### **1. Damages**

#### **A. Property Value**

Trodden and Hawken believe that the houses in the neighborhood have been diminished in value up to as much as \$100,000 per house over the last few years. They recognize that the real estate market everywhere has been depressed, and that only part of the diminution in value can be attributed to the soot. The neighbors do not agree with Biomassive's contention that the neighborhood fireplace chimneys are the cause of the soot, noting that the fireplaces would not have been a source of sooty deposits in the summer, when the soot was the worst.

One of the neighbors is a real estate agent who estimates that the depressed real estate market by itself probably contributed up to \$50,000 in the drop in home value. Based on what they know, the neighbors want to recover between \$200,000 and \$500,000 in settlement from Biomassive for the diminution in home value. At trial, proving up this issue would require testimony from a real estate economist, another expense which the neighbors cannot afford.

#### **B. Health Effects**

Other than Hawken's kidney disease and the sooty deposits on their property, the neighbors do not have any evidence of physical harm, at least not at present. If the neighbors cannot afford to hire an expert to prove their homes lost value due to the soot, and Hawken's health claim fails, their public nuisance claim is in trouble. If there are additional human health effects due to the emissions, it may take years for such effects to become apparent.

Hawken's kidney disease could potentially result in a large recovery at trial. Hawken's doctor believes that the kidney disease was caused by emissions from the plant, and his doctor will testify to that at trial. Hawken, aged 52, already has lost wages from missing work as a result of his health condition. When he is working full time, he makes \$60,000 as a supervisor for a trucking company that hauls nuts and other agriculture products for Biomassive. He is often in too much pain to go to work. He is missing 3 out of 5 days of work, and his employer has threatened to lay him off. Hawken wants to recover as much as possible, but should seek at least \$1 million to substitute for lost wages and medical costs.

Unknown future health impacts are difficult to quantify, again requiring expensive expert witness testimony. But Biomassive might be willing to pay some amount of money now to avoid having to defend claims arising years from now. The neighbors want to get as much as possible from Biomassive for future harm. For the health impacts, the neighbors seek a payment in the range of \$2.5 to 4.5 million.

## **2. Injunction**

The neighbors suspect Biomassive was violating its permit by burning urban waste containing high percentages of non-wood materials under the cover of darkness so no one could see the dark plume coming from the stack. They want an injunction term requiring it to operate only during daylight hours. They want an order prohibiting Biomassive from burning urban waste in its boiler. They also want Biomassive to agree to an injunction term that would require it to install state-of-the-art particulate control equipment to eliminate sooty emissions from the boiler. Finally, the citizens want Biomassive to publish its air emissions monitoring data in real time on the internet, so that it can be viewed and tracked by anyone.

The neighbors want an injunction that will

- (1) limit plant hours or shut the plant down completely at night;
- (2) limit (as a percentage) or eliminate burning of urban waste; and
- (3) reduce truck trips and require covering loads of fuel.

## Confidential Facts Round 2 - ARB

### 1. Penalty

The ARB reviewed Biomassive's monitoring data for June-September and found permit violations nearly every day. On some days Biomassive exceeded both the three hour and twenty-four hour permit limits for criteria pollutants. The state penalty statutes provide for a range of penalties and require the agency or the factfinder to consider as appropriate the statutory factors in setting the penalty.

The penalty factors are: (1) The extent of harm caused by the violation; (2) The nature and persistence of the violation; (3) The length of time over which the violation occurs; (4) The frequency of past violations; (4) The record of maintenance; (5) The unproven or innovative nature of the control equipment; (6) Any action taken by the person including the nature, extent, and time of response of any cleanup and construction undertaken, to mitigate the violation; (7) The financial burden on the defendant; and (8) Any other circumstances the court deems relevant. Cal. Health & Saf. Code, § 42400.8.

The penalties are significant, ranging from \$25,000 to \$75,000 per day depending on whether the agency can show the violation was negligent, knowing, or intentional. See generally Cal. Health & Saf. Code, §§ 42400.1-42400.3. ARB believes based on the facts it uncovered in its investigation, and Biomassive's attempt to settle out with the locals for a relative pittance, the statutory maximum applies for the emissions and tampering violations, and it is up to Biomassive to show what mitigating factors apply to reduce the penalty.

ARB is aware that Biomassive believes its internal audit and self-disclosure of the tampering is a mitigating factor but it disagrees with Biomassive's analysis. ARB believes the self-disclosure resulted only from Biomassive's after-the-fact response to ARB's investigations and the self-disclosure policy does not apply. See [www.calepa.ca.gov/Enforcement/Policy/VolDisclosure.pdf](http://www.calepa.ca.gov/Enforcement/Policy/VolDisclosure.pdf). The self-disclosure only disclosed the fact that there was tampering, not the permit violations uncovered by the ARB's investigations and careful, labor-intensive review of monitoring data.

ARB has therefore calculated a penalty based on the statutory maximum of \$75,000/day for 122 days, or \$9,150,000.<sup>1</sup> ARB hopes to obtain in settlement at least fifty percent of this sum, \$4,575,000, but it would accept less than that if Biomassive agrees to fund one or more really good SEPs. ARB will seek the full amount initially, and argue that if the matter proceeds to trial there could be even more penalties in light of the numerous violations of the three hour permit limits.

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<sup>1</sup>ARB could seek additional penalties for violations of the three hour limits (up to 8/day) but proving the actual number of three hour violations at trial will be extremely difficult, given the available data.

## **2. Economic Benefit**

In addition, ARB wants complete disgorgement of the \$17-24 million in energy profits. It believes Biomassive made a calculated decision to violate its permit to obtain these profits and should not be allowed to keep them. But ARB is also aware that the agricultural industry has suffered in recent years from international competition and rising labor and transportation costs, particularly fuel costs. ARB is also aware that co-generation facilities dispose of wastes that might otherwise be open-burned, landfilled, or left as forest residue. These practices have their own harmful effects on air quality. See generally G. Morris, R. Williams, Micales & Scog, *supra*. ARB's goal is not to shut Biomassive's plants down but to see that they are run within permit limits. Again, if ARB is able to get really good SEPs, it will consider taking less than \$17 million in economic benefits, but it would be embarrassed to take less than \$8 million.

## **3. SEPs**

ARB is willing to discuss various SEPs in lieu of some portion of a penalty. There are criteria that apply to such proposals. See CAL/EPA Recommended Guidance on Supplemental Environmental Projects, pp. 2-6, <http://www.calepa.ca.gov/Enforcement/Policy/SEPGuide.pdf>. ARB wants SEPs that have real environmental benefits and do not require ARB to get involved in lengthy or complicated administrative oversight. For example, ARB is very interested in having Biomassive make a lump-sum payment to the California District Attorneys Association environmental circuit prosecutor fund. Another good project would be a dedication of some of Biomassive's substantial landholdings as a wildlife preserve.

Biomassive owns thousands of acres of agricultural land tracts in the Bay-Delta, which it is actively farming. ARB wants Biomassive to donate as much Bay-Delta property as possible to a permanent wildlife preserve. The farming operations on the Delta islands are beset with problems like erosion, potential levee failures, and water supply issues. Taking some of Biomassive's property out of production will generally improve Delta water quality, air quality, and may reduce emissions from trucking and agricultural equipment. The more acres ARB can convince Biomassive to dedicate to wildlife, the better. ARB should seek at least 1,000 acres. If Biomassive is willing to donate more acreage, ARB will consider taking a reduced amount for penalties and/or economic benefits. Farm land in the Delta is presently valued at around \$25,000 per acre.

ARB knows that Biomassive's officials are active members of Wildfowl Forever, a conservation group also known for its duck hunting activities. ARB will want to limit the amount of hunting allowed on any tracts dedicated for wildlife preserve status.

ARB also knows that by dedicating property for wildlife, Biomassive will obtain very favorable tax treatment for such property.

ARB will not consider self-interested studies or proposals that merely implement changes to the company's business operations that the company was already going to do anyway. There may, however, be other proposals that ARB has not considered that would be worthwhile SEPs.

#### **4. Oversight**

ARB has spent \$175,000 to date to investigate the violations, run the penalty model, and prepare for negotiations. It wants this money back. This is non-negotiable.

##### **The Local Agency Settlement Agreements**

ARB anticipates that Biomassive will argue that all or some of its case is weakened by Biomassive's settlement agreements with the locals. It does not buy Biomassive's argument that the settlement agreements bind the entire state and believes a judge would find these documents to be shams. ARB believes this is an important public policy issue and is willing to take this issue to a judge, if necessary, to establish this.